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SUCCESSIONS AND DONATIONS

Carlos E. Lazarus*

DONATIONS INTER VIVOS

Formal Requirements

The Louisiana Civil Code requires, under penalty of nullity, that an act be passed before a notary and two witnesses of every donation inter vivos, whether of movables, immovables, or incorporeals, and that in order to have effect, the donation must be accepted by the donee in precise terms either in the act of donation itself, or in a subsequent act also passed before a notary and two witnesses.¹ A donation inter vivos may nevertheless result from other contracts or transactions that, though not labeled as donations, confer a gratuitous advantage upon the intended donee.² A donation is nonetheless a donation because it is in the form of a *stipulation pour autrui* in favor of a gratuitous beneficiary,³ or because it is made indirectly, or in disguise in the form of a sale or other onerous contract in which no price is paid, or in which the stipulated price is much below the fair value of the thing sold.⁴ Yet, if the strict formalities of articles 1536-1538 were not observed, these and other similar transactions would be invalid. Certificates of stock and other negotiable instruments which represent incorporeal rights insusceptible of manual gifts, could not be given absent the formal requirements of a notarial act and the express acceptance by the donee. Nevertheless, the jurisprudence, without exempting these transactions from the strict

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1. LA. CIV. CODE arts. 1536, 1538, 1540. An exception is immediately made in the case of donations of corporeal movables which can be made by simple delivery. In such donations the express acceptance of the donee is necessarily dispensed with, it being implied from his taking corporeal possession of the things given. *Id.* arts. 1539, 1541. See *Sisters of Charity of Incarnate Word v. Emery*, 114 La. 614, 81 So. 99 (1919). But cf. *Works v. Noble*, 177 La. 618, 149 So. 423 (1933).

2. See LA. CIV. CODE art. 1248.

3. *Id.* arts. 1890, 1902.

4. *Id.* art. 1248: "The advantage which a father bestows upon his son, though in any other manner than by *donation* or legacy, is likewise subject to collation. Thus, when a father has sold a thing to his son at a very low price, or has paid for him the price of some purchase, for [or] has spent money to improve his son's estate, all that is subject to collation." (Emphasis added).

Id. art. 2444: "The sales of immovable property made by parents to their children, may be attacked by the forced heirs as *donations in disguise* if the latter can prove that no price has been paid or that the price was below one-fourth of the real value of the immovable sold at the time of the sale." (Emphasis added).

formalities contained in these articles of the Code, has upheld the validity of many such transfers on other grounds. But these decisions lack uniformity and clarity.⁵ *Primeaux v. Libersat*⁶ is illustrative. The defendant was the registered owner of corporate shares that either had been issued to him initially by the corporation at the time of incorporation, or subsequently re-issued to him in place of other shares that had been surrendered to the corporation by the initial owners thereof. Although admitting the incorporeal nature of the shares, the supreme court, upon determining that the defendant was in fact the legal owner of the shares, because they were issued to him in accordance with the applicable law, concluded that since the consideration for their issuance had in fact been paid by the defendant's father with donative intent, the defendant had validly acquired them [from the corporation?] by donation, without the necessity of the additional formality of an authentic act.⁷ The decision leaves one with the impression that perhaps the court was thinking more in terms of a donation of the money rather than of a donation of the shares themselves.⁸ Problems such as this

5. A check issued and delivered by the drawer-donor to the payee-donee and by the latter cashed before the donor's death was held valid as a manual gift of the money on deposit; but the delivery of a promissory note payable to the payee-donor and by him endorsed to the donee-endorsee was held to be an incorporeal right not susceptible of a manual gift. *Succession of DePouilly*, 22 La. Ann. 97 (1870).

On the other hand, a check certified at the instance of the drawer (in which case the certifying bank becomes a promisor) and payable to the payee-donor and by the latter endorsed and delivered to the endorsee-donee was held to constitute a donation of the fund in the hands of the certifying bank. *Succession of LeRoy*, 157 La. 1077, 103 So. 328 (1925).

So also, the purchase of an immovable in the name of another has been held to be a valid donation of the immovable (or perhaps of the money paid?) although the formal requirement of an express acceptance by the "vendee" was lacking. *Cotton v. Washburn*, 228 La. 832, 84 So. 2d 208 (1955).

And the gratuitous transfer of corporate stock (which is undeniably an incorporeal right) has been held to constitute a valid donation inter vivos without the formality of an authentic act. *LeBlanc v. Volker*, 198 So. 398 (La. App. Or. Cir. 1940).

And in *Succession of Weiss*, 162 So. 2d 791 (La. App. 4th Cir. 1964), the purchase of United States Savings bonds payable to alternate payees was held to constitute an additional method of making donations inter vivos.

6. 322 So. 2d 147 (La. 1975).

7. "Louisiana interpretations hold the present transfers of shares of stock to the donee, valid under the stock transfer act . . . to be valid also as donations to him, because the consideration for their issuance was furnished by the donor with such donative intent." *Id.* at 152.

8. The court, making reference to 3 M. PLANIOL, *CIVIL LAW TREATISE* pt. 3, no. 2453A at 244 (11th ed. La. St. L. Inst. transl. 1959), notes that where property is purchased in the name of another, the object of the donation is not the acquired

could not have arisen under the Digest of Laws of 1808, article 53.⁹ Under that provision, only those acts which purported on their face to be or to contain donations inter vivos had to be in authentic form. Consequently, a donation disguised in the form of a sale could be effective as a valid donation inter vivos even though the act of sale was not in authentic form.¹⁰ And the same result occurs under the source article in the Code Napoléon.¹¹ But the redactors of the Code of 1825 suppressed article 53 of the Digest, as being included in what are now articles 1536-1538 of the present Code,¹² and the Louisiana Supreme Court, in 1898, noting the difference in the language used, was quick to hold that a deliberate change had been made and that, under the provisions of article 1536, in order to have effect as a donation, the instrument whereby the conveyance was made had to be in authentic form.¹³ The writer suggests, in light of the reasons given by the redactors for the suppression of the provisions formerly contained in the Digest,¹⁴ that no material change was actually intended, and that the rule of article 1536 should be applicable only in those cases where the instrument whereby the conveyance is made professes to be a donation.¹⁵

property, but the sum of money paid for it, which is the equivalent of an indirect manual gift, relieving the nominal purchaser from the payment of the price.

9. La. Digest of 1808, art. 53, p. 220. "All acts *containing* donations inter vivos must be passed before a notary and two witnesses in the usual form of contracts. . . ." *Id.*

The corresponding article 931 of the Code Napoléon (1804) is as follows: "All acts *importing* a donation inter vivos shall be passed before notaries in the usual form of contracts . . ." and in the *Projet du Gouvernement* (1800) Book III, Title IX, art. 46, the proposed article reads as follows: "All acts *containing* a donation inter vivos, must be passed before a notary in the usual form of contracts. . ." (Emphasis added).

10. Trahan v. McManus, 2 La. 209 (1831).

11. See 10 AUBRY ET RAU, DROIT CIVIL FRANÇAIS § 659(2) (6th ed. Esmein 1954) in C. LAZARUS, 3 CIVIL LAW TRANSLATIONS 102 *et seq.* (1969) [hereinafter cited as AUBRY ET RAU]; 3 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL n° 2543 *et seq.* (11th ed. 1959).

12. 1 La. Legal Archives, *Projet*, p. 209 (1937).

13. Lambert v. Penn Mut. Life Ins. Co., 50 La. Ann. 1027, 24 So. 16 (1898), where the court stated: "But this article was changed in the Code of 1825 so as to make the law declare that 'an act shall be passed before a notary and two witnesses of every donation.' etc. . . . The conclusion we announce on this subject is that a donation made in the form of an onerous contract . . . which is not such because without consideration, and really intended as a donation in disguise, to have effect as a donation, must be passed before a notary public and two witnesses."

14. The article was already included in the proposed text of the new provisions suggested. See 1 La. Legal Archives, *Projet*, p. 209 (1937).

15. Cf. concurring opinion by St. Paul, J., in Succession of LeRoy, 157 La. 1077, 1083, 103 So. 328, 331 (1925), in which he suggests that article 1536 of the Civil Code should be held to apply only to credits that are not otherwise transferable by delivery, or by delivery plus endorsement.

Donations with Reservation of Usufruct

In *Estate of Richard v. Richard*,¹⁶ the dative testamentary executor filed suit against an heir of the testator to declare the nullity of a donation inter vivos made to him by the testator with reservation of usufruct in violation of article 1533 of the Louisiana Civil Code.¹⁷ He alleged that although the act of donation recited that the donation was onerous, the value of the alleged services was less than half the value of the property given.¹⁸ The lower court sustained the defendant's exception of no right of action on the basis of article 1504 of the Civil Code which limits the right to seek *reduction of excessive* donations to the forced heirs, their heirs or assigns. The court of appeal reversed on the grounds that since the plaintiff had alleged facts which, if established, would make the donation purely gratuitous and therefore, a radical nullity, the donation could be attacked by any interested party, including the succession representative, who, under article 685 of the Code of Civil Procedure is expressly authorized to enforce rights of the deceased or of his succession.¹⁹

Donations Omnium Bonorum

In 1957, by three separate acts of sale in authentic form, I.M. Owen sold three tracts of land as follows: Tract 1, consisting of 40 acres to W.H. Owen for a stipulated price of \$100; Tract 2, also consisting of 40 acres to J.B. Owen, for a stated price of \$720; and Tract 3, consisting of 15 acres, jointly to W.H. and J.B. Owen, for \$300. The acts of sale, duly recorded, recited that the stipulated price had been paid in cash, receipt of which was acknowledged. There was nothing in these instruments to indicate that the vendor was the father of the vendees, nor that the property sold constituted all the property of the vendor. In 1972, some 15 years after the death of the vendor, J.B. Owen sold his interest in Tract 3 to his brother W.H. Owen, and in 1973, W.H. Owen sold both his tracts (Tracts 1 and 3) to the

16. 321 So. 2d 375 (La. App. 3d Cir. 1975).

17. Article 1533 of the Louisiana Civil Code has since been amended by La. Act 210 of 1974 restoring the provisions of the La. Digest of 1808, art. 50, p. 220, permitting the donor to reserve to his own advantage the usufruct of the immovable given.

18. Under LA. CIV. CODE art. 1526, the rules of donations inter vivos are applicable only where the value of the thing given greatly exceeds (by one-half) the value of the service or charge.

19. LA. CODE CIV. P. art. 685: ". . . [T]he succession representative . . . is the proper plaintiff to sue to enforce a right of the deceased or of his succession while the latter is under administration. The heirs or legatees of the deceased whether present or represented in the state or not, need not be joined as parties, whether the action is personal, real, or mixed."

defendants Wayne S. and Charles W. Bush. Nine months later, the six other children of the vendor, including J.B. Owen, brought suit to revendicate the property from the defendants, alleging that the sales from I.M. Owen to his sons were simulations, and in the alternative, that they were donations in disguise *omnium bonorum*, prohibited by article 1497 of the Civil Code. The Second Circuit Court of Appeal, having found, as had the trial court, that the sales in question were in fact donations *inter vivos* and that the donor had divested himself of all of his property without reserving enough for his subsistence,²⁰ rendered judgment in favor of the plaintiffs, holding that the donations were void *ab initio* and therefore not translatiue of ownership, and that consequently, the defendants were not entitled to the protection afforded by the public records doctrine.²¹ The Louisiana Supreme Court, although in agreement with the trial and appellate courts that the sales by I.M. Owen to his sons were donations rather than simulations, a valid transfer *animus donandi* having taken place,²² was not as ready as the lower courts had been to find that donations *omnium bonorum* had been made.²³ Nevertheless, (and assuming for the purposes of its decision that the donations were in fact *omnium bonorum*.) the court set aside the judgments of the courts below, and dismissed the plaintiffs' suit holding that since there was nothing of record to indicate that the vendor had divested himself of all his property without reserving enough for his subsistence, the vendees

20. The record nevertheless indicated that the vendor was entitled to and was receiving social security benefits and that at the time of his death he still had \$600 in cash.

21. *Owen v. Owen*, 325 So. 2d 283, 288, 289 (La. App. 2d Cir. 1976): "When the donation is or is deemed to be self-evident, it is a question of fact whether the donor has retained sufficient property for his subsistence . . . and notwithstanding the protection afforded third party purchasers by the public records doctrine, the purchaser from the donee assumes the risk of losing the property to the donor or his forced heirs (after the death) because of the nullity declared by La. C.C. Art. 1497. In such a case, the donation, in whatever form or however disguised is not an act translatiue of title. . . ."

"Under the circumstances of this case, the donation in disguise was void *ab-initio* under La. C.C. Art. 1497. The sale disguised as a donation here (sic) [the donation disguised as a sale?] was *not* an act translatiue of title. . . ." (Emphasis added).

22. In a simulation pure and simple, no actual transfer is intended by the parties and consequently the transaction is ineffective as a conveyance.

23. "In order to sustain an attack on a gift as a donation *omnium bonorum* the heirs must prove conclusively that the donation divested the donor of all of his property (citing cases). In light of the stringent requirement set forth in the aforementioned cases, *we are not as certain as were the lower courts* that the requirements of Article 1497 were met so as to brand I.M. Owen's disguised donations as donations *omnium bonorum*." *Owen v. Owen*, 336 So. 2d 782, 786 (La. 1976) (emphasis added).

from the original donee had acquired a clear title to the tracts involved.²⁴ In effect, this decision means that a donation *omnium bonorum* although branded as a nullity by article 1497 of the Civil Code, is nevertheless translatif of ownership, particularly when the donation is disguised in the form of a sale. In this respect, it follows the rationale in *Jenkins v. Svarva*,²⁵ in which, on facts that for all practical purposes are identical, the supreme court held that a third party purchaser in good faith who, relying on the public record, had purchased property from vendees of the donee, had acquired good title to the property by the acquisitive prescription of 10 years as against the donor who had asserted the nullity of the donation under article 1497.²⁶ With this no one can seriously disagree. Were one to follow the rules formulated by the court of appeal, a purchaser would be saddled with the impossible burden of ascertaining in every instance, beyond the record, that his vendor's author in title had not deprived himself of the things necessary for his sustenance when he sold or gave the immovable, or that he had not disposed of everything he had. No one declares or is expected to declare, in an act of conveyance that he is or is not disposing of all of his property, or that he is or is not reserving enough for his subsistence!

Viewed in its proper light, article 1497 is a limitation on the right of disposition. It comes to Louisiana from the Spanish law:²⁷ Law 4, Title 4, Partida 5, did not require the donor to execute the donation if by executing

24. "We hold, therefore, that where there is nothing of record to indicate that the transfer to the original vendee could have been annulled as a donation *omnium bonorum*, and when an innocent party has purchased the land for valuable consideration relying upon the public records, the third party takes the property free of the unrecorded and secret equities." *Id.* at 788.

25. 131 La. 749, 60 So. 232 (1912).

26. "Conceding that an action to annul a donation *omnium bonorum* is not prescriptible, does it follow that the property donated cannot be acquired by third persons by prescription? We think not . . . If the donor stands by, silent and inactive, and permits a third person to take and hold adverse possession of the property, he, like any other owner, takes the chances of such adverse possession ripening into a legal title. The nullity of the donation does not prevent a third person from acquiring the property by the prescription of 30 years based on adverse possession alone, *nor does it prevent a third person from acquiring the property by the prescription of 10 years, based on a title translatif of property*, and on adverse possession." *Id.*, 60 So. at 233 (Emphasis added).

The writer apologizes for the statement in 34 LA. L. REV. 219, 228, 229 (1974) to the effect that the donation *omnium bonorum* particularly where disguised as a sale, constitutes an act translatif of ownership which can be the basis for the acquisitive prescription of 10 years as against any one *other than the donor himself* which was inadvertently made in error.

27. 1 La. Legal Archives, Projet, p. 207 (1937). The redactors give *Recopilación de Castilla*, Book 5, tit. 10, law 8, as the source of this article.

it, he would have deprived himself of the means of earning a livelihood. Later, Law 69 of the Laws of Toro, subsequently carried forward as Law 2, Title 7, Book 10 of the *Novísima Recopilación*, prohibited the donation of all the property of the donee, although the donation comprised only the present property of the donor.²⁸ And the same limitation presently exists in article 364 of the Civil Code of Spain, although the rule is there stated in permissive terms, *i.e.*, the donor *may* dispose of all of his property provided he reserves enough for his subsistence.²⁹ The reason for the limitation is, as was the case under the prior laws, the protection of the vendor from his own folly or prodigality.³⁰ But under the Spanish law, the donation *omnium bonorum* is not null *ipso facto*. The Spanish law recognizes the principle, as does French and Louisiana law, that a donation inter vivos retains its effect during the life of the donor, so that the donation *omnium bonorum* must produce all its effects until it is proved that as a result thereof, the donor has rendered himself impecunious.³¹ Furthermore, under article 634 of the Spanish Civil Code, the donation *omnium bonorum*, when proved to be one, is null only as to the excess.³² It should logically follow, therefore, that the donee, having become the perfect owner of the thing given by an act translativo of ownership as distinguished from an act that conveys only a precarious title, may freely dispose of the thing given and that his purchaser will acquire a valid title.

The problem presented in *Owen v. Owen* is only one of the many that have arisen in connection with the interpretation and application of article 1497. Although the article seems to be free from ambiguity, in fact it is not, and much confusion has arisen as to its exact meaning.³³ Questions may be asked, for example, as to whether article 1497 establishes an additional cause for the revocation of donations,³⁴ rather than an absolute nullity, and

28. "Ninguno pueda hacer donación de todos sus bienes, aunque lo haga solamente de los presentes."

29. "La donación podrá comprender todos los bienes del donante, o parte de ellos, con tal que éste se reserve en plena propiedad o en usufructo, lo necesario para vivir en un estado correspondiente a sus circunstancias."

30. 5 MANRESA, COMENTARIOS AL CÓDIGO CIVIL ESPAÑOL 129 (1932) [hereinafter cited as MANRESA].

31. *Id.* at 128-29.

32. *Id.*

33. Compare the cases referred to in the opinion rendered by the Court of Appeal for the Second Circuit in 325 So. 2d 283, 286 n.1. See also footnotes 35 & 36, *infra*.

34. Since donations inter vivos are essentially irrevocable and retain their effect during the life of the donor (LA. CIV. CODE arts. 1468, 1503), they cannot be revoked at will (LA. CIV. CODE arts. 1529, 1531) and can only be revoked for the causes enumerated in LA. CIV. CODE arts. 1559, 1560. The provisions of LA. CIV. CODE art. 1497 are not found in the Code Napoléon.

if so, who may institute such an action and to what extent should the revocation be decreed? Could it be said that the right of revocation, if such it is, should be personal to the donor and that he may exercise it only so long as the subject matter of the donation is still in the hands of the donee?³⁵ Should the right exist also in favor of the spouse or the presumptive forced heirs of the donor who, should the donor become impecunious, will have to assume the obligations of support and maintenance prescribed by articles 119 and 229 of the Civil Code? And should the right survive in favor of the heirs of the donor in view of the fact that after his death, the evil sought to be corrected no longer exists?³⁶ It is clear that a reappraisal of the entire subject matter is called for,³⁷ and although the writer has no ready answers for these questions, the following is suggested for arriving at a correct and satisfactory solution. If article 1497 is to be retained as part of the Louisiana law,³⁸ it should be given a meaning compatible with the reasons and the spirit of the very law it purports to adopt, *i.e.*, the protection of the donor against his own folly or prodigality. As a limitation on the power of disposition, article 1497 should be construed as containing an additional ground for the revocation of donations, and not as creating an absolute nullity. The law should thus be invoked only by the donor himself, and possibly by those who would have the obligation of supporting him for the rest of his life, if, as a result of the donation, he has rendered himself a public charge. After his

35. *Cf.* Langrange v. Barre, 11 Rob. 302 (1854).

36. *See* Bernard v. Noel, 45 La. Ann. 1135, 1137, 13 So. 737, 738 (1893), in which the court wisely states: "The nullity declared by article 1497 of the Civil Code is absolute only relatively to the particular persons in whose special interest it was passed, and among them cannot be classed [the collateral heirs of the donor] invoking it when she had not done so herself In the case at bar the right to invoke the nullity was a *personal one*, in the sense that when she died the right to revoke the act died also. To discover the true meaning of a law we must often consider the reason and spirit of it, the cause which induced the legislature to enact it, and the mischief which it sought to prevent or remedy. However general may be the terms in which it is couched, it only extends to those things or persons it appears the legislature intended it to reach and apply to. The law in question, in its enactment, did not have in view the collateral heirs, and it certainly was not passed for their benefit." (Emphasis added).

37. *See* Maxwell v. Maxwell, 180 La. 35, 156 So. 166 (1934) (holding that the right is personal to the donor; that it cannot be instituted by the presumptive forced heirs of the donor; and that after the death of the donor, his heirs may institute the action but "*only to the extent of their legitime.*") (Emphasis added); Succession of Turgeau, 130 La. 650, 58 So. 497 (1912); *Cf.* Litton v. Stephens, 187 La. 918, 175 So. 619 (1939); Caraway v. LeBlanc, 1 La. App. 192 (1924) (holding that the donation is void *ab initio* and allowing the heirs of the donor to set it aside after his death).

38. *Cf.* LA. CIV. CODE art. 1528 which, but for art. 1497, would *permit* the donation of all the present property of the donor, prohibiting only the donation of future property.

death, the evil that the law seeks to prevent no longer exists and the right that the donor had should die with him. After the death of the donor, his forced heirs should only be permitted to exercise the right, which is now theirs, to reduce the dispositions made by him if proved to have been made in excess of the disposable portion.³⁹ The writer believes that the security of titles requires these solutions. As for the rest, *Owen v. Owen* and *Jenkins v. Svarva* seem to resolve three important points: (1) the donation *omnium bonorum* is not null *ipso facto*, as the Spanish say; its nullity can be established only after proof of the essential elements of article 1497; (2) since the donation *omnium bonorum* may form the basis for the acquisitive prescription of 10 years in good faith, the nullity declared by article 1497 cannot be classed as an absolute nullity; and (3) where the donation is disguised as a sale or other onerous contract, a purchaser in good faith, relying on the public record, acquires an indefeasible title as against the heirs of the donor, even without the aid of the acquisitive prescription of 10 years. Nothing, however, should prevent the revocation of the donation where fraud has been practiced.⁴⁰

From another point of view, since the prohibition of article 1533 is no more,⁴¹ a donor who disposes of all of his present property gratuitously, with reservation of usufruct, will certainly have reserved enough for his subsistence assuming of course that what he had in the first place was sufficient to take care of his needs.

Revocation

A donation *inter vivos* is a gratuitous contract whereby the donor divests himself at present and irrevocably of the thing given in favor of the donee⁴² and which, as any other contract, requires the concurrence of the reciprocal consent of the parties and does not become perfect until it is accepted by the donee.⁴³ Consequently, it may not be revoked unilaterally or by the sole and arbitrary will of the donor.⁴⁴ Nevertheless, since donations *inter vivos* may be made subject to any valid charges or conditions

39. This is the solution that obtains under article 634 of the Civil Code of Spain. See MANRESA at 128-29. The right to institute this action, however, would prescribe in five years from the death of the donor under LA. CIV. CODE art. 3542.

40. *Broussard v. Doucet*, 236 La. 217, 107 So. 2d 448 (1958).

41. See LA. CIV. CODE art. 1533, as amended by La. Acts 1974, No. 210.

42. *Id.* art. 1468.

43. *Id.* art. 1540.

44. *Id.* art. 1529.

that the donor may impose on the donee,⁴⁵ such donations may be judicially resolved at the instance of the donor or his heirs for the non-performance of such charges or conditions.⁴⁶ In *Mobly v. Lee*⁴⁷ the donor, "in consideration for the love and affection she bears to [the donee] . . . and for her personal care . . ." donated 60 acres of land to her niece. Subsequently the donor executed a unilateral act of revocation before a notary public, in which she stated that the donation "was an onerous donation given for the promise of the personal care of herself by the donee" and that the donee had failed to care for her. Notwithstanding, the donee subsequently sold the property to the defendant; and the plaintiffs, the lawful heirs of the donor, apparently alleging the onerous character of the donation and the effectiveness of the revocation, instituted a petitory action claiming the ownership of the property. The court seems to have had difficulty in resolving the issue presented which, as the court stated, was "whether the . . . donation . . . was purely gratuitous. If it was, then the subsequent revocation thereof . . . was of no effect."⁴⁸ The problem seems to have been whether the words "and for her personal care" transformed the donation into an onerous one. It was the position of the court that "[i]f the donation [was] in fact onerous, then it [was] not a real donation and the rules for the construction of contracts apply."⁴⁹ Then, by reference to the articles on obligations and particularly article 1958 of the Civil Code, it resolved the ambiguity in the act of donation against the donor and concluded that the donation was purely gratuitous and accordingly that the revocation was ineffective. The writer finds fault with this approach (1) because it leaves the impression that an onerous donation may be revoked unilaterally; and (2) because an onerous donation, *i.e.*, a donation that imposes charges or conditions upon the donee, is nonetheless a gratuitous disposition subject to the rules applicable to donations, except where the value of the thing given does not greatly exceed (by one-half) the value of the charge imposed.⁵⁰ It does not appear from the report that these values were ever considered by the court. If indeed the donation had been made on condition that the donee should support and care for the donor, the remedy of the plaintiff should have been to sue for the revocation of the donation for the non-performance of the charges imposed.⁵¹

45. *Id.* art. 1527.

46. *Id.* arts. 1559-61; 1567.

47. 318 So. 2d 631 (La. App. 3d Cir. 1975).

48. *Id.* at 632.

49. *Id.* at 634.

50. LA. CIV. CODE art. 1526. In this case the transaction is treated as a simple onerous contract.

51. See *Voinche v. Town of Marksville*, 124 La. 712, 50 So. 662 (1909).

TESTAMENTARY DISPOSITIONS

Formal Requirements

In *Succession of Greer v. Wiggins*,⁵² a legatee under an olographic testament dated "April 49, 1943" appealed from a default judgment in favor of the forced heirs of the deceased declaring the nullity of the testament because of the uncertainty of the date. In the court of appeal, the appellant's contention, that the requirement for an exact and certain date was of no significance because there were no other competing wills, was rejected and, on the authority of *Succession of Beird*⁵³ and its progeny, the judgment of the trial court was affirmed. On rehearing, however, and noting that in *Succession of Boyd*⁵⁴ the supreme court had, in the interim, "changed or at least clarified the law," the court reversed its judgment and, over the objection of the appellees,⁵⁵ remanded the case to allow the appellant an opportunity to introduce extrinsic evidence to prove the exact date on which the testament had been written. The appellant's original contention, that the requirement for an exact date was not significant under the facts presented, was again rejected, the court holding that certainty as to the month and year alone was insufficient to support the validity of the testament. The decision is sound. Under article 1588 of the Civil Code the date is not only an essential part of the olographic testament, but it is also necessary to determine, for example, whether at the time of its execution, the testator had testamentary capacity, whether the testament was written before or after the birth of a child,⁵⁶ or whether it was the last of two or more testaments. A date that lacks any of its component parts (the day, the month and the year) or a date, the component parts of which are unclear or ambiguous and cannot reasonably be ascertained by other admissible evidence, constitutes no date at all.

In *Succession of Harris*,⁵⁷ the Fourth Circuit Court of Appeal held that a statutory will typewritten in 2 mm size type was a valid will notwithstanding the fact that the testator, even with the aid of his reading glasses, was unable to read anything written in a type size smaller than 10 mm. Since the statute⁵⁸ "does not require recital or proof that the will was actually read by

52. 315 So. 2d 46 (La. App. 2d Cir. 1975).

53. 145 La. 756, 82 So. 881 (1919).

54. 306 So. 2d 687 (La. 1975), noted in 36 LA. L. REV. 366 (1976).

55. The judgment below had gone by default; appellant should not be permitted to assert on appeal a defense not raised in the lower court.

56. See LA. CIV. CODE art. 1705.

57. 329 So. 2d 493 (La. App. 4th Cir.), cert. denied, 332 So. 2d 862 (La. 1976) ("no error of law").

58. LA. R.S. 9:2442 (1964).

the testator," the court said, the fact "that the testator did not read the will does not invalidate it."⁵⁹ In the writer's opinion, the issue before the court was not the validity vel non of the will, but the *capacity* of the testator to make it. A person who cannot read either because he does not know how or because he is otherwise incapacitated is declared incapable to make a will either in the mystic form,⁶⁰ or in the form provided for by R.S. 9:2442. The evident purpose of the law is to safeguard against fraud, imposition, and deceit. The testator should be able to compare what has been written with what his wishes are regarding the ultimate disposition of his patrimony, and the fact that the testator may choose to read or not to read the testament that has been prepared for him is of no consequence. In this case the report indicates that the testator could not read this particular testament because the print was too small. He was thus in the same position, in relation to this will, as if he had not known how to read, and consequently, legally incapable of making it. The point has now become moot regarding the statutory will inasmuch as the Louisiana legislature, by Act 333 of 1976, has virtually repealed R.S. 9:2443, insofar as it was applicable to the testator himself, by providing the method for and the formalities to be observed in the confection of the statutory will "when the testator is blind or does not know how or is not able to read." It should be noted however, that in such cases the new legislation requires that the testament be read aloud to the testator, the notary, and the three witnesses in the presence of each other, which should be an adequate safeguard. But persons who cannot read or know not how to read are still incapable of making a mystic testament or of being witnesses to statutory wills.⁶¹ It is hoped that the rationale of this decision will not be extended to cases involving mystic testaments.

Interpretation of Testaments

In *Carter v. Succession of Carter*,⁶² the testator had made an olographic testament, valid in form, in which, after making a special bequest to his wife of all his interest "in our home place consisting of fifteen acres more or less" he "further" bequeathed all of his separate property and "all cash, bonds and other valuables" he would possess at his death. Alleging that the "further" bequest named no legatee, the testator's brothers and

59. 329 So. 2d at 494.

60. LA. CIV. CODE art. 1586: "Those who know not how or are unable to write (sic) [read] and those who know not how or are not able to sign their names, cannot make dispositions in the form of the mystic will."

61. LA. R.S. 9:2443 (1964): ". . . [T]hose who know not how or are not able to read cannot . . . be attesting witnesses [to a statutory will]."

62. 332 So. 2d 439 (La. 1976).

sisters, as his legitimate heirs of the second class, claimed that the testator had died intestate as to his separate estate as against the widow in community who claimed the entire succession as universal legatee. The supreme court, reversing the court of appeal⁶³ and reinstating the judgment of the lower court, had no difficulty in concluding that since the testator had already named his wife his legatee, it was his clear intention by his "further" bequest, to constitute her as the legatee of his entire estate.⁶⁴

Prohibited Substitutions

In *Roberts v. Cristina*,⁶⁵ the testator appointed Louis DeSonier Jr. "or his successor" as attorney for the executrix of his estate. Mr. DeSonier was subsequently elevated to the bench and consequently was unable to serve, and when the testator died the defendants, the widow and two surviving children of the testator employed other attorneys to handle the succession, whereupon plaintiff, DeSonier's former partner in the practice of law whom DeSonier considered as his successor and to whom he had turned over all his files,⁶⁶ instituted this suit claiming his fee as the attorney entitled to handle the succession of the deceased. Holding that the designation of DeSonier as the attorney for the executrix was a legacy conferring upon the legatee (DeSonier) the right to choose his successor, the Fourth Circuit Court of Appeal concluded that the legacy contained a prohibited substitution under article 1520 and dismissed the plaintiff's suit. The writer believes that the court was in error on three counts: (1) in holding that the appointment of the attorney constituted a legacy, which it does not;⁶⁷ (2) in citing *Rivet v. Battistella* as authority for the proposition that such an appointment constitutes a legacy, which it is not;⁶⁸ and (3) in holding that

63. 321 So. 2d 370 (La. App. 3d Cir. 1975).

64. "It would require a strained and unnatural interpretation to conclude that the testator declared that he further bequeathed all of his interest in his separate property, and all of the cash, bonds and other valuables he possessed but nevertheless failed to name the legatee or legatees who were to be the beneficiaries. Such a reading renders all stipulations after 'I further bequeath' ineffective. Such a result is contrary to Article 1713 of the Civil Code directing that 'a disposition must be understood in the sense in which it can have effect, rather than that in which it can have none'." 332 So. 2d at 442.

65. 323 So. 2d 888 (La. App. 4th Cir. 1976).

66. *Id.* at 889.

67. A legacy is a disposition of all or a part of the testator's patrimony. LA. CIV. CODE art. 1469.

68. What the court is saying in *Battistella* is that the designation of the attorney for the executor by the testator *constitutes a valid condition imposed by the testator upon the legatees and which is binding on the legatees*. In the language of the court:

"The only question presented is whether such designation in a will is valid and binding on those who take under the will.

the legacy, if such it was, contained a prohibited substitution, which it does not.⁶⁹ If the testator's designation or appointment of the attorney was a legacy, and if it contained a substitution of legatees, then it is submitted that the substitution is not a prohibited one but a substitution permitted under article 1521 of the Civil Code that provides that a legacy to a second named legatee in case the legatee first named does not or is unwilling to take is valid. It is to be regretted that the supreme court refused to review this decision.⁷⁰

Revocation

In *Succession of Melancon*,⁷¹ the testator, evidently intending to revoke expressly two of the legacies contained in his statutory testament, had written beside each of them the notation "this item revoked"⁷² followed by his signature. Observing that neither notation was dated, the Third Circuit Court of Appeal held that, although entirely written and signed by the testator, the notations were not made in the form prescribed for the olographic testament⁷³ and therefore was ineffective as revocations. A strict application of article 1692 requires this result, and the decision

"If such a designation be not binding on those to take under the will, then the reason must be because such designation is contrary to law or good morals, or in violation of some well-recognized public policy. For the 'donor may impose *on the donee* any charges or conditions he pleases provided they contain nothing contrary to law or good morals.' R.C.C. 1527, 1519.

"But there is nothing contrary to good morals in such a designation and there is no law which forbids it" *Rivet v. Battistella*, 167 La. 766, 120 So. 289 (1929) (emphasis added).

69. The substitution prohibited by article 1520 is the bequest that contains (1) a double disposition in *full ownership* of the same thing to two or more persons who are called to receive it, one *after* the other (2) imposing a charge upon the legatee first to take to preserve the thing given (3) to be transmitted at his death to the substitute, *i.e.*, in successive order. *Cf. Marshall v. Pearce*, 34 La. Ann. 577 (1882) (Hamlin, J., concurring in part and dissenting in part) and *Sanders, C.J.*, (dissenting) in *Succession of Simms*, 250 La. 177, 239-50, 195 So. 2d 114, 137-40 (1967).

In this case, there was nothing bequeathed, much less in full ownership; there was no charge to preserve anything, much less an obligation to transmit anything to another at death.

70. 328 So. 2d 109 (La. 1976) (*Sanders, C.J.*, dissenting).

71. 330 So. 2d 679 (La. App. 3d Cir. 1976).

72. Actually, the two legacies were numbered "F" and "I," respectively. With regard to item "F" the testator had written: "I revoke Section F." As to Legacy "I" the testator had interlined through it the notation "This item Revoked."

73. "Had Dr. Melancon supplied a handwritten date to his notations and signature he would have validly revoked the bequest to the Ward children and to Linton Allen, however, Dr. Melancon's alteration, as written, is clearly not in any testamentary form recognized under Louisiana law." 330 So. 2d at 682.

appears to be sound but only inasmuch as these notations were actually intended as *express*, as distinguished from *tacit*, revocations.⁷⁴ The writer was left with the impression, however, that the defacing, erasure, obliteration or destruction of a testament, or of a part thereof, other than an olographic testament, would likewise be ineffective as a revocation.⁷⁵ The writer suggests that, since under article 1691 of the Civil Code, a tacit revocation results from any act that supposes a change of will,⁷⁶ an effective total revocation may very well result from the destruction or laceration by the testator of any testament made by him, or from erasures or obliterations made by the testator of any words that are essential to the validity of the testament.⁷⁷ So also, it would seem that the obliteration or erasure made by the testator of a disposition contained in his will should result in a partial tacit revocation thereof, whether the testament is in the olographic, or in any other form.⁷⁸

BENEFIT PLANS

Treating the provisions contained in employee retirement and profit

74. LA. CIV. CODE art. 1692: "The act by which a testamentary disposition is [expressly] revoked, must be made in one of the forms prescribed for testaments, and clothed with the same formalities."

75. "We recognize that Article 1589 of the Civil Code and the jurisprudence interpreting the provisions thereof recognize that the writer of an olographic will may alter or completely change testamentary dispositions in his hand written testament without affecting its validity so long as the alterations or additions are made by the hand of the testator. In such cases it is not necessary that the testator's approval appear on the face of the will itself. . . . *This informality regarding change in testamentary dispositions is not allowed, however, in other forms of wills rather as to such other forms of wills the provisions of R. C. C. Article 1692 apply.*" 330 So. 2d at 682 (Emphasis added).

76. LA. CIV. CODE art. 1691: "The revocation . . . [is] tacit when it results from some other disposition of the testator, or from some act which supposes a change of will." See also Succession of Muh, 34 La. Ann. 394, 398 (1883), where the court states: "If the testator has made another disposition, repugnant to and inconsistent with the previous one, although nothing is said about revoking the former, a tacit revocation will thereby be made. So also if he has done *any act which supposes a change of will, let that act be what it may*, provided always the *intention to revoke is fairly and legally deducible from it*, a tacit revocation will result from the act." (Emphasis added).

77. This includes the erasure or obliteration of the date in an olographic will, for example, or the erasure or obliteration of the testator's signature or of one of the attesting witnesses, in other kinds of wills.

78. Cf. LA. CIV. CODE art. 1589; Succession of Butterworth, 195 La. 115, 196 So. 39 (1940); Succession of Muh, 34 La. Ann. 394 (1883); Succession of Makofsky, 120 So. 2d 277 (La. App. Orl. Cir. 1960). See 11 AUBRY ET RAU at § 725 to the effect that a testament by public act may be *tacitly* revoked in the same manner as an olographic testament, by the obliteration, destruction or laceration thereof.

sharing plans for the payment of death benefits as analogous to life insurance contracts, recent court of appeal decisions had held that the rules of the Louisiana Civil Code relative to donations inter vivos and mortis causa were inapplicable, that the assignment of the death benefit to a designated beneficiary in conformity with the plans was effective as a gratuitous disposition, and that the accumulated contributions payable upon death to the beneficiary designated by the deceased employee did not form part of his succession.⁷⁹ These decisions do not appear to have taken into consideration prior adjudications in which the court had refused to extend the rationale of the cases dealing with life insurance to other devices which might effectively deprive a forced heir of his légitime or a surviving spouse of his share in the community.⁸⁰ These decisions did, however, distinguish cases dealing with the apportionment of potential benefits to which the employee himself would be entitled upon his retirement and which characterized the benefits as separate or community funds depending upon whether the interest of the retiree was acquired prior to or during the existence of the community of gains.⁸¹ In *T.L. James & Co. v. Montgomery*,⁸² the supreme court, although recognizing on rehearing the contractual

79. Succession of Mendoza, 288 So. 2d 673 (La. App. 4th Cir. 1974); Succession of Rockvoan, 141 So. 2d 438 (La. App. 4th Cir. 1962). Cf. *T.L. James & Co. v. Montgomery*, 308 So. 2d 481 (La. App. 1st Cir. 1975). Accordingly, the beneficiary took free and clear from the rights of forced heirs and free from the rights of surviving spouses in community. In *Mendoza*, where the deceased employee had failed to name a beneficiary and where the proceeds (which were financed by the employer alone) were thus payable to the estate of the deceased, the court likewise held that the death benefit was the separate property of the deceased employee who had become a participant in the plan prior to his marriage. In *Rockvoan*, a lump-sum death benefit (resulting from contributions made by both the employer and the employee pursuant to a plan in which the deceased had become a participant 15 days prior to his marriage) was held to be separate property of the deceased in which the surviving spouse had no community rights, and the proceeds were held to be payable to the son of the deceased by a prior marriage as the designated beneficiary thereof.

80. *Winsberg v. Winsberg*, 220 La. 398, 56 So. 2d 730 (1952); Succession of Geagan, 212 La. 574, 33 So. 2d 118 (1947); Succession of Guerre, 197 So. 2d 738 (La. App. 4th Cir.), *cert. denied*, 199 So. 2d 925, 926 (1967). In these cases the courts, although recognizing the authority of Congress, in the issuance of bonds, to superimpose on the Louisiana law new methods of making gratuitous dispositions, nevertheless held that the donations thus made are subject to the restrictions imposed by the substantive law of Louisiana and that the rights of the alternate co-owner or of the beneficiary upon death to receive the proceeds of the bonds is limited by his duty to account to a surviving spouse in community or to a forced heir for any invasion of their respective rights.

81. *Lynch v. Lawrence*, 293 So. 2d 598 (La. App. 1st Cir.), *cert. denied*, 295 So. 2d 809, 814 (La. 1974); *Langlinais v. David*, 289 So. 2d 343 (La. App. 3d Cir. 1970); *Lafitte v. Lafitte*, 232 So. 2d 92 (La. App. 2d Cir. 1970).

82. 332 So. 2d 834 (La. 1976).

designation of a beneficiary as a valid gratuitous disposition,⁸³ expressly overrules the earlier appellate decisions, particularly the *Rockvoan* and *Mendoza* cases,⁸⁴ and holds that the contributions paid by an employer into the retirement fund to the credit of the employee, unlike the proceeds of life insurance, constitute additional compensation for services rendered and accordingly, the benefits received or to be received by the employee upon retirement or by his designated beneficiary upon death are subject to the claims of forced heirs and of a surviving spouse in community.⁸⁵ In that case, Montgomery, who had been married twice, became a participant in the company's profit sharing and retirement plans during his first marriage. In 1958, following his divorce, he married his surviving spouse. One son, Thomas, was born of the first marriage, and a second son, Monty George, was born of the second marriage. Shortly before his death in 1971, Montgomery had designated Thomas as the beneficiary of both plans. At the time of his death, the proceeds from the profit sharing plan amounted to \$26,330.14 and the proceeds from the retirement plan to \$37,545.30. In a concursus proceeding initiated by T.L. James and the trustees of the funds, Thomas asserted his right to the entire proceeds as the designated beneficiary upon death; the two wives each claimed their respective community interests; and Monty George claimed his *légitime*. Having concluded that the benefits payable under the plans constituted additional remuneration, it was a simple matter for the court to divide the "*total contributions paid into the employee's accounts*" into three classifications: (1) those made during the first marriage, belonging to the first community, one-half to each spouse; (2) those made when the deceased employee was unmarried, belonging to his separate estate; and (3) those made during his second marriage, belonging to the second community, one-half to each spouse.⁸⁶

83. On original hearing the court had held that the customary beneficiary designation was an invalid disposition *mortis causa*. L.A. R.S. 23:651-653, enacted by La. Act 494 of 1976, expressly provides that the beneficiary designation is effective and need not be in testamentary form.

84. See note 79, *supra*.

85. "We thus hold, consistent with the views expressed in the earlier part of this opinion . . . that, although the contractual beneficiary may receive in full ownership the share of the funds passing to him by virtue of the decedent's contractual designation of him as beneficiary, he does so with the obligation to account to any complaining forced heir or spouse in community if his receipt of the proceeds violates either the former's *légitime* or the latter's community ownership rights. . . ." 332 So. 2d at 855.

86. The difficulty with the formula is, as pointed out by Professor LeVan, that it can work only where the plan actually calls for the establishment of a separate account for each employee and where the employer's contributions paid into each account directly reflect benefits earned by the employee during that period, which is

The judgment of the court thus recognizes the first son as the contractual beneficiary of the proceeds, receiving them as owner, less the amount found to be due to the surviving widow as her share of the contributions made during the second community, and less any funds that would be due to the second son in satisfaction of his *légitime* if found to have been impaired by the otherwise valid contractual disposition.⁸⁷ It is interesting to note that the court reaffirmed its position in *Teachers' Retirement System v. Vial*⁸⁸ in which it held that the accumulated contributions deducted from the salary of a teacher during the existence of the marriage and credited to his individual account in the teachers' retirement fund, as provided by law, were the separate property of the teacher rather than a community asset and that the assignment of the death benefits thereunder constituted a valid disposition of the funds payable and belonging to the designated beneficiary notwithstanding the formalities of the Civil Code relative to donations *mortis causa*. Although the question as to whether the payee-beneficiary of the death benefits would be accountable to the surviving spouse for one-half of the contributions made by the teacher-spouse during the marriage, or to the forced heir for his *légitime*, was rendered moot in the *Vial* case,⁸⁹ intermediate courts of appeal decisions are to the effect that the separate estate of the teacher-spouse is indebted to the community for the "enhancement" of his or her separate estate,⁹⁰ which in effect means that the retiree has to pay to the non-teacher spouse one-half of the contributions paid during the existence of the community.⁹¹ It would thus appear that whether one treats the retirement benefit as additional compensation to the employee during the marriage (where contributions are made by the employer) or as

rarely the case since the contributions are more likely to "reflect the amount necessary to maintain the overall actuarial soundness of the pension fund based on a variety of facts most of which have little or no direct bearing on the increase in benefits 'earned' by the employee." *The Louisiana Estate Planner*, Vol. 2, No. 6, p. 45 (June, 1976).

87. The claim of the first wife was disallowed on the grounds that she had specifically prayed for the recognition of her son's claim as the beneficiary upon death, and that it was only in the alternative that she asserted her own claim.

88. 317 So. 2d 179 (La. 1975).

89. As to the community claim, since the plaintiff had inherited the successions of her mother and father, she had become both debtor and creditor of the same amount and the debt had thus been extinguished by confusion. As to the claim for the *légitime*, the court found that it had been satisfied by the amounts she had already received from the succession of her father.

90. LA. CIV. CODE art. 2408.

91. *Blalock v. Blalock*, 259 So. 2d 367 (La. App. 2d Cir. 1972); *Broyles v. Broyles*, 215 So. 2d 526 (La. App. 1st Cir. 1968); *Moore v. Moore*, 187 So. 2d 145 (La. App. 2d Cir. 1966).

the separate estate of the employee (where the fund to be distributed consists of the contributions made by the employee under the State Teachers' Retirement System) the end result is the same. In both, the retiree is accountable to the non-employee spouse for one-half of the benefits received, and in both the designated beneficiary upon death is accountable to forced heirs for their légitime.

In this connection, one should also consider *Jochum v. Estate of Fabre*⁹² in which the Fourth Circuit Court of Appeal, assimilating the accumulation of deductions from an employee's salary towards his retirement to the proceeds due under an annuity contract,⁹³ holds, under the authority of *Succession of Rabouin*,⁹⁴ that the fund thus created, whether payable to the employee on retirement, or to his designated beneficiary upon death, forms part of the estate of the employee to be included in the inventory of his succession.⁹⁵

92. 313 So. 2d 870 (La. App. 4th Cir. 1975).

93. Counsel for both parties had stipulated that they considered the accumulation of deductions from the employee's salary as proceeds due under an annuity contract, and the court so treated them. See *id.* at 871 n.1.

94. 201 La. 227, 9 So. 2d 529 (1942).

95. *Cf.* *Moore v. Moore*, 187 So. 2d 145 (La. App. 2d Cir. 1966), which excludes from the inventory of community assets the benefits derived from the State Teachers Retirement System.